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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

MERCANTILE NATIONAL BANK AT DALLAS,
Appellant,
v.
C. H. LANGDEAU, Receiver for I.C.T. INSURANCE COMPANY,
Appellee.
No. 14

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,
v.
C. H. LANGDEAU, Receiver for I.C.T. INSURANCE COMPANY,
Appellee.
No. 15

APPELLANTS' MEMORANDUM AFTER REARGUMENT

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APPELLANTS' MEMORANDUM AFTER REARGUMENT

Colloquy occurred at the reargument on December 5, 1962, concerning certain points of Texas venue practice not raised or briefed previously herein, and collateral to the federal issue before the Court. Appellants, in accordance with the direction of the Chief Justice, respectfully submit this memorandum concerning those points.

1. Transfer as to appellants only—the only relief herein sought—is authorized and required by Texas practice. Rule 89 of the Texas Rules of Civil Procedure provides:

> "If a plea of privilege is sustained, the cause shall not be dismissed, but the court shall transfer said cause to the proper court; and the costs incurred prior to the time such suit is filed in the court to which said cause is transferred shall be taxed against the plaintiff. The clerk shall make up a transcript of all the orders made in said cause, certifying thereto officially under the seal of the court, and send it with the original papers in the cause to the clerk of the court to which the venue has been changed. Provided, however, if the cause be severable as to parties defendant and shall be ordered transferred as to one or more defendants but not as to all, the clerk, instead of sending the original papers, shall make certified copies of such filed papers as directed by the court and forward the same to the clerk of the court to which the venue has been changed. After the cause has been transferred, as above provided for, the same will be subject to trial at the expiration of ten days after the mailing of notification to the parties or their attorneys by the clerk or any party or his attorney that the papers have been filed in the court to which the cause has been transferred."

Under this rule, upon sustaining appellants' venue pleas, this cause as to each appellant—at least—should be trans-

ferred as to it. *Tunstill v. Scott*, 138 Tex. 425, 160 S. W. 2d 65 (1942), syllabus 4. Each appellant seeks only such a transfer. Each appellant opposes here, and would have opposed in the Texas courts, transfer of appellee's whole cause to Dallas County, Texas. Upon a holding by this Court that appellants' venue pleas should have been recognized below, appellants urge that this Court should reverse the judgment below and remand the cause with a direction that the Texas Supreme Court order the cause as to each appellant transferred to a civil district court of Dallas County, Texas. 28 U.S.C. § 2106; opening brief of Mercantile National Bank, p. 46; opening brief of Republic National Bank, p. 46, and Supplemental Brief, p. 17.

2. **Transfer of causes as to non-complaining defendants can be had upon consent and in the discretion of the Texas court.** Following the sustaining of appellants' pleas of privilege, as to any defendants (other than appellants) who do not object to transfer, transfer of the cause as to them upon the application of plaintiffs or upon their application lies in the discretion of the court in Texas. The court *may* transfer under such circumstances by inclusion of the action as to any such defendants with the action being transferred under Rule 41 of the Texas Rules of Civil Procedure:

> "* * * Parties may be dropped or added, or suits filed separately may be consolidated, or actions which have been improperly joined may be severed and each ground of recovery improperly joined may be docketed as a separate suit between the same parties, by order of the court on motion of any party or on its own initiative at any stage of the action, before the time of submission

> to the jury or to the court if trial is without a jury, on such terms as are just. Any claim against a party may be severed and proceeded with separately."

We emphasize that we are discussing here only a question of power of the Texas courts, and each of appellants would object to the trial of the charges by appellee herein in any manner other than seperately as to it, in Dallas or elsewhere.

3. Appellant ostensibly could have maintained original Dallas venue without consent of any defendant, under Texas venue statutes. Without the consent of any defendant, appellee—as stated by appellee's counsel at the re-argument herein—could have originally proceeded to cast venue of this action in Dallas County, Texas, in compliance with 12 U.S.C. § 94 upon which appellants rely and in accordance with appropriate Texas venue provisions. Art 1995, subd. 4, Texas Revised Civil Statutes:

> "No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases:
>
> "• • •
>
> "4. Defendants in different counties.—If two or more defendants reside in different counties, suit may be brought in any county where one of the defendants resides. The transfer or assignment of a note or chose in action shall not entitle any subsequent holder to sue thereon in any other county than that in which suit could have been prosecuted if no assignment or transfer had been made."

Appellee's ostensible right to maintain venue under this statute would be subject to pleading and proof by evidence

at a venue hearing of court-made as well as statutory facts upon which the exception is authorized. *Stockyards Nat. Bank v. Maples*, 127 Tex. 633, 95 S. W. 2d 1300 (1936).

4. Appellee would have had the right under his theories of his action (disputed by appellants) to urge transfer to Dallas of this whole cause, heretofore or upon a remand, but has chosen not to take the necessary steps to do so. Over the objection of any defendant, *and* assuming the correctness of appellee's contentions as to the nature of his action, appellee might earlier have taken steps to seek transfer of this whole cause upon a sustaining of appellants' pleas of privilege. *Tunstill v. Scott, supra*, authorizes transfer as to all defendants upon sustaining of the pleas of privilege of any of them, in an action in which plaintiff seeks only joint relief against the defendants. Appellee has sworn upon this record (R. 339) that his action is "joint" for venue purposes. We emphasize, however, without arguing the point here, that we disagree with that characterization by appellee of the nature of his action. Each appellant herein would oppose transfer of this cause as to any other defendant herein, on the ground that appellee has not shown by evidence that he has a cause of action against any defendant for joint relief, as well as that the action is not solely for joint relief as evidenced by the petition alone (R. 1, 315-321). Compare *Stedman v. International Harvester Company*, 319 S. W. 2d 791 (Tex. Civ. App.) with *International Harvester Company v. Stedman*, 159 Tex. 593, 324 S. W. 2d 543 (1959).

In any event, however, appellee has elected not to follow the Texas procedure necessary to force a transfer of this cause as to other defendants not consenting, even under his theory that his action is for "joint" relief. To get such transfer appellant is required to have served a copy of his controverting affidavit on each defendant as to whom he wants the action transferred along with the action against a complaining defendant. The record herein reflects no such service and, such requirement of service being jurisdictional as to defendants, other than the non-complaining defendants it can not now be transferred as to them. *Tunstill v. Scott, supra*. See 38 TEX. L. REV. 345 (1960).

Respectfully submitted,

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By